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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 683

ALBERT GREGOR KAMMERER, *Petitioner,*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THURMAN ARNOLD
1229 19th Street, N.W.
Washington 6, D.C.

E. WAY HIGHSMITH,
Brunswick, Georgia
Attorneys for Petitioner.

ARNOLD, FORTAS & PORTER,
1229 19th Street, N.W.,
Washington 6, D. C.

HIGHSMITH & HIGHSMITH,
Brunswick, Georgia.
Of Counsel.

March, 1955.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Albert Gregor Kammerer prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on January 7, 1955.

OPINIONS BELOW

The opinion of the District Court on post-trial motions (Appendix A hereto) (R. 29-39) is not reported. The opinion of the Court of Appeals (Appendix B hereto) (R.

710) is reported in 218 F.2d 149. The opinion of the Court of Appeals on the first appeal is reported in 205 F.2d 525.

JURISDICTION

The judgment of the Court of Appeals (Appendix C hereto) was entered on January 7, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Was the Court of Appeals justified in ordering a third trial in a jury case on the sole ground that argument by plaintiff's counsel might have prejudiced the jury, where liability was fully established and where the trial judge had specifically and clearly instructed the jury to consider only the evidence before it and to disregard arguments of counsel?

2. Where liability was plain and the jury verdict was not subject to attack on the merits, did the Court of Appeals usurp the function of the jury and the District Court by reversing because it objected to argument by plaintiff's counsel?

STATEMENT

This is an action for wrongful death, brought by the father of the deceased in the United States District Court for the Southern District of Georgia. Jurisdiction was based on diversity of citizenship. The case has been tried twice before a jury: each time the jury has found a verdict of $50,000 for the plaintiff (Petitioner here) and each time the judgment has been reversed by the Court of Appeals.

The facts are as follows:

Petitioner's twenty-four year old son was killed one night in August, 1951, when the automobile he was driving struck a darkened engine and box car parked directly across a well-travelled street in Brunswick, Georgia (R. 200-7, 245-7, 358-9, 420). The crossing was unlighted and

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the only warnings at the crossing were rectangular painted signs which did not comply with Georgia law either as to shape or visibility, and in addition were partially obscured by overhanging branches and moss (R. 231-2, 404-7, 420-1, 446). Some years prior to the accident the track had ceased to be used as a main line and its only use at the time of the accident was for occasional switching operations generally carried on after midnight (R. 400-2, 437-8, 449-52).

On the night that young Kammerer was killed, an engine and a box car in front of it were brought up along the track and parked directly across the grade crossing while the conductor got out to inspect two box cars standing just beyond the crossing (R. 355-62, 520-21). The train was dark and no light was visible from the street (R. 301, 310, 464). No flares were set out as signals. Overhanging tree limbs and shadows cast by the moon further camouflaged the darkened train (R. 239-40, 276-7, 336-7). Petitioner's son, driving alone, crashed straight into the train apparently without even enough warning to swerve or to apply the brakes (R. 300, 361).

These essential facts of Petitioner's case were uncontradicted and indeed largely based on the testimony of defendant's own employees. (E.g., R. 347-429.) In overruling post-trial motions, the trial judge stated that in his opinion "the Jury was authorized to find that plaintiff's 24-year-old son was killed as a result of the wanton negligence of the defendant . . ." (R. 38).

This too was the opinion of Rives, J., dissenting from the reversal of the first judgment as follows, 205 F.2d at 526:

> "In my opinion, the jury were authorized to find that the appellee's twenty-four year old son had been *wantonly killed* by appellant's servants. The track was a spur track abandoned in 1949 and the re-use of which had begun only a few months before the fatal accident without any new warning signs or notice to the public. There was no necessity for blocking the street. The

> engine with one box car attached had been stopped clear of the street, and then instead of the conductor's walking across the street to inspect the car on the opposite side and ascertain whether it was empty, he had the engine to start again and continue its movement until the street was completely blocked by a box car and engine with the headlight of the engine admittedly not burning. As the conductor opened the door of the box car, the fatal crash occurred.'"[1] (Emphasis supplied)

Nor did the judges who reversed both judgments doubt the railroad's negligence. The first reversal was for instructions on the possibility that the deceased may also have been negligent.[2] The court required that on this issue the jury be instructed that the deceased was the cause of his own death if he was driving too fast to stop within the distance of his lights and if properly working lights would have revealed the engine. The required instruction on this subject having been given at the second trial and the jury verdict again being for plaintiff, the second reversal did not deal with the question of liability at all.[3]

Indeed the defense was quite weak, consisting almost exclusively of some testimony that the car was travelling fast (R. 30, 501-510), and an abortive attempt to intimate without proof that the deceased may have been drinking (R. 30, 362, 488).

Defense counsel on the second trial made several demands for mistrial and a number of objections to parts of

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[1] Judge Rives did not sit on the panel on the appeal from the second judgment. Judge Holmes, who wrote both opinions, was the only member common to both panels.

[2] See 205 F. 2d at 526. The issue would then be the comparative fault of the parties, contributory negligence not being a complete defense under Georgia law.

[3] Except for a brief reiteration from the first opinion that "the real question as to liability is one of comparative negligence". (R. 711)

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the opening and closing statements of plaintiff's counsel.[4] In the course of denying the motions for mistrial, the court advised the jury on each occasion that they must disregard statements of counsel not supported by evidence.[5]

In the course of the week long trial the defense made the following objections to opening and closing statements:

In his opening statement, (1) plaintiff's counsel stated to the jury that "this young man was killed by the most inexcusable negligence that they [the jury] have ever experienced in the Court house." (R. 142). The court on motion for a mistrial instructed the jury to confine itself to the evidence. (2) Counsel stated: "I have no prejudice or bias against the railroad of any kind. I have been counsel for the Southern Railroad myself." (R. 143).[6]

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[4] He was apparently influenced in doing so by statements in the Court of Appeals opinion on the first reversal to the effect that opening statements should be limited to a statement of intended proof without argumentation, 205 F. 2d at 525. On the first trial, plaintiff's counsel made a much stronger plea without objection from the defense. (Id.) Judge Rives, dissenting, stated: "Under the facts of this case, I think that the defendant's counsel may have been well advised in not objecting to the plaintiff's opening statement or to the oral charge of the District Court. Read as a whole, that charge seems to me a fair and able presentation of the issues to the jury."

[5] Defense counsel was himself not immune to the normal tendency of counsel to engage in advocacy. Despite the brevity of his opening statement, it was necessary for the court to point out that he was indulging in the same type of argument and "witnessing" in his opening to which he objected on the part of plaintiff's counsel (R. 172).

[6] In its opinion quoting this statement the Court of Appeals did not note that it had been invited by an accusation of the defense (R. 141, 143). The full paragraph is as follows:

> "Now, Mr. Conyers, has already started objecting, saying that I am telling you that because it is a railroad company you should return a verdict for the plaintiff. I want to relieve your minds of that completely. We don't want one cent more in this case than the plaintiff is entitled to. I have no prejudice or bias against the railroad of any kind. I have been counsel for the Southern Railroad myself—" (R. 143).

(3) Objection was made that a statement by counsel on the law of damages was argumentative (R. 151). (4) Counsel read the complaint and commented on it. The defense asked for a mistrial on the ground that he was not confining himself to an outline of the facts but was actually arguing the case (R. 160, 174). The court advised the jury that they should consider counsel's statement only to the extent that it was confined to facts he intended to prove (R. 161, 174-175).

In the closing argument, (1) counsel cited the fact that farmers must fence their land to keep livestock off the highway, to show that the railroad also owed care in keeping its trains off the highway. The Court told the jury to ignore this statement (R. 637-638). (2) Counsel stated that three other persons had been killed in similar fashion and the court *promptly and specifically* directed the jury that other accidents were not admissible and the jury must confine themselves to the evidence in the present case without considering any statement of counsel (R. 660, 661, quoted in the opinion of the Court of Appeals, R. 717-719). (3) He also asked for a verdict that would shock the company into compliance with its obligations, and the court instructed the jury to disregard that statement (R. 675-6).

Further, at the very beginning of his charge, the trial judge told the jury:

> "Now, gentlemen of the jury, before I commence to charge you, I want to instruct you to disregard any statements made by counsel relative to any matter other than the evidence that has been presented to you. Now, sometimes counsel may inadvertently make some statement that has no connection whatsoever with the case on trial, but you disregard any such statements and confine yourself solely to the evidence as presented in this case and the law as given you in charge by the Court. You just disregard entirely any statements that might have been made by either counsel in this case that is not supported by the evidence in this case." (R. 678)

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Following the jury's verdict, the Court overruled a motion for judgment n.o.v. and for a new trial, noting, *inter alia,* that "the Court took extraordinary pains upon the second trial to admonish the jury that they were not to consider any remarks made by counsel for either side which did not bear directly on the issues . . ." (R. 32).

On appeal, the court below found that the district court had let the trial "get out of bounds". It stated that in his opening speech the plaintiff's attorney "did not confine himself to a simple statement of the issues presented by the pleadings, or to the facts that he intended to prove by the witnesses" but made "an inflammatory speech to the jury upon the merits of the case, discussing both the law and the facts in strong language and stating facts that would be clearly inadmissible in evidence." (R. 711). It held this to be prejudicial because it could not assume that the jurors would remember the District Court's instructions to disregard what they had been told to disregard (R. 716). The Court of Appeals devoted its entire attention to the plaintiff's opening statement, with some comment on the closing statement. It made no mention of the overwhelming case presented by plaintiff on the merits. It ignored completely both the testimony and the facts demonstrating the trial judge's firm control of the proceedings. Instead it cited the objections mentioned above and placed great emphasis on a series of remarks of counsel as prejudicial, one of which was actually made *out of the hearing of the jury* and others of which, *not objected to by the defense,* were statements of facts plaintiff "intended to prove" and later actually proved by witnesses. (See pp. 11-13 infra.)

The Court of Appeals reversed for a third trial. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals usurps the functions of the District Court and trenches on those of the jury in direct conflict with rulings of this Court and of other Courts of Appeals. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-243; and, e.g., *Twachtman* v. *Connelly*, 106 F.2d 501, 509 (C.A. 6, 1939); *United States* v. *Goodman*, 110 F.2d 390, 394-395 (C.A. 7, 1940); *Washington Times Co.* v. *Bonner*, 86 F.2d 836, 848-849 (C.A.D.C., 1936). It is universally held that it is the function of the district judge, who has observed the trial throughout, to determine whether argument of counsel requires any corrective action, and, if so, what action is needed. This determination depends on factors which cannot be effectively evaluated by courts of appeals from a printed record. *United States* v. *Goodman*, 110 F.2d 390, 394-395 (C.A. 7, 1940). Except in the most extreme cases, courts of appeals must refrain from substituting their own judgment for that of trial judges on questions arising from argument of counsel, especially where, as here, the trial judge has actually taken corrective action. *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 637-638 (C.A. 2, 1946); *United States* v. *Cohen*, 177 F.2d 523, 527 (C.A. 2, 1949); *Fleming* v. *Husted*, 164 F.2d 65, 68 (C.A. 8, 1947).

A basic reason for keeping control of argument of counsel in the hands of district judges is to make certain that the jury's role is not infringed. Where a verdict is solidly supported by the evidence and no errors of law have been committed, appellate court reversals based on the theory that the jury may have reached the wrong result through prejudice infringe the successful party's constitutional right to a jury trial—a right effectively denied Petitioner here. This is not a case where the evidence is so balanced that argument might be expected to affect the result. *Stanczak* v. *Pennsylvania R. Co.*, 174 F.2d 43, 47-48 (C.A. 7, 1949); *Landay* v. *United States*, 108 F.2d 698, 706 (C.A.

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6, 1939). Rather it is one where the admitted facts clearly establish liability and it is most unlikely that improper statements by counsel affected the outcome. Moreover, defense counsel's repeated objections and the trial court's careful and immediate instructions to the jury in each instance were adequate to cope with improper argument had the case in fact been a close one. In these circumstances, the well-settled rule is that the jury's verdict, upheld by the trial judge, must be allowed to stand. See, *e.g.*, *Murphy* v. *Lehigh Valley R. Co.*, 158 F.2d 481, 484-485 (C.A. 2, 1946); *Ocean Accident & Guarantee Corp.* v. *Penick & Ford*, 101 F.2d 493, 500 (C.A. 8, 1939); *Washington & O. D. Ry. Co.* v. *Smith*, 289 Fed. 582, 588 (C.A.D.C., 1923); *St. Louis Smelting & Refining Co.* v. *Henke*, 277 Fed. 665, 667 (C.A. 7, 1922); *Diggs* v. *United States*, 220 Fed. 545, 555-557 (C.A. 9, 1915).

II.

The holding below that this trial got "out of bounds" is utterly unjustified on the record. The trial was conducted by an exceptionally able, experienced and respected judge who has lived all of his life in Brunswick and is noted for control of the proceedings in his court. Counsel for plaintiff and defendant were distinguished members of the local bar. Thus it is inherently incredible that the trial should have been such a disorderly procedure as described in the Court of Appeals opinion. In addition, such a conclusion is refuted by the record itself. The trial lasted a full week. The opening argument complained of was on the first day and lasted only an hour.[7] The trial produced 600 pages of printed record; in all of those pages there are relatively few objections by defense counsel and still fewer remarks which the Court of Appeals considered improper. The

[7] Court opened at 2 p.m. (R. 130). By 3:20 (by error stated in the record as 2:20 (R. 175)) the opening statements of plaintiff and defendant were concluded, including preliminary matters and discussion of law out of the hearing of the jury (R. 130-140).

trial court ruled promptly and decisively on all objections presented to it and conducted the trial with fairness and dispatch. Under the circumstances it is most unlikely that improper argumentation on Monday could have affected the jury's verdict rendered on Friday.

Furthermore, the evidence plainly established liability. The District judge said in denying post-trial motions:

> "This Court having heard the evidence in this case on two trials and having carefully observed the witnesses, considered their testimony, their manner of testifying and their demeanor on the stand, and having carefully studied the pictures, maps and other exhibits tendered in evidence, is of the opinion that the Jury was authorized to find that plaintiff's 24-year-old son was killed as the result of the wanton negligence of the defendant, its servants, agents and employees. The verdict rendered in the case on both trials was for a modest sum compared to what the jury would have been authorized to find under the law of Georgia considering the age, earning capacity and future prospects of the deceased as shown by the undisputed evidence. This Court is of the opinion that the verdict was fair and just under the facts of this case." (R. 38)

The District Court concluded that the trial was such that the verdict of the jury fairly reflected its judgment of the facts untainted by bias and prejudice.[8] This conclusion was based on a life-long familiarity with the local population from which the jury was selected and on personal knowledge of all the events of a week long trial. Certainly the Court of Appeals was in no position on the basis of a cold printed record to overrule this judgment.

The action of the Court of Appeals is the less excusable because the record shows that many of its strictures on the opening statement were unjustified and that the statement was in fact limited to a "statement of the issues" and the facts plaintiff "intended to prove by the witnesses."

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[8] *Cf.* defense counsel's remark in both his opening and closing statements to the jury that "whatever verdict you bring in will be satisfactory to us" (R. 173, 660).

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Thus, the Court of Appeals' opinion cites as prejudicial a number of remarks. They were in the main matters to which the defense, despite its frequent complaints in other respects, made no objection at the time they occurred, limiting itself to a subsequent objection to the whole statement (R. 160, 174).

(1) The opinion quotes counsel's characterization of the Georgia statute imposing liability for the full value of the life without deduction for living expenses as partly penal in character (R. 712; 136-37), disregarding the fact that the statement quoted, in addition to being a correct statement of Georgia law, was made *while the jury was excluded from the court and out of its hearing* (R. 136).[9] (2) The opinion objected to counsel's reference to the fact that petitioner is an invalid, although proof to this effect is a necessary element under Georgia law which permits recovery only upon a showing of dependency of the petitioner upon the deceased (R. 686-87).[10] (3) The appeals court objected to argument that the plaintiff was one of the most promising and finest young men in the City of Brunswick although on the record it was established by witnesses that he had supported his father, that he had a good war record,

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[9] *Cf.* the fact that on the occasion of the first reversal the Court of Appeals criticized plaintiff's counsel for prejudicing the jury with the argument that only a railroad company could escape prosecution for such wanton negligence. 205 F. 2d at 525. An extensive petition for rehearing called to the attention of the Court of Appeals that this statement was not made to the jury at all, but only in the brief in the Court of Appeals itself. The petition for rehearing was denied without amendment of the opinion.

A copy of the record on the first appeal including the Petition for Rehearing will be filed in this Court.

[10] The Court of Appeals' opinion (R. 713) quoting from the opening statement replaces with asterisks the portions which would have made this clear. The record shows that the statement in full is that the deceased "was living with his invalid father *and upon whom his father was dependent and to whom he contributed, and was living in the same home.*" (R. 142-143) (Italic material omitted in the Court of Appeals opinion).

that he had had pre-law training, that he intended to practice law and that all of these facts were necessary elements of damages.[11] (4) The deceased's sobriety, reference to which was also criticized in the opinion, was the subject of actual proof (e.g., R. 176) made necessary by the unsuccessful attempt of the defendant to assert the contrary (R. 362, 488).[12] (5) The extensive quotation (R. 714-715) from the argument describing the trip of petitioner and counsel to the scene of the accident one month later under similar circumstances was a description of evidence actually produced at the trial (R. 233-242) establishing that at the same phase of the moon and the same time of night as the accident occurred, the crossing was in fact camouflaged by shadows cast by the moon.[13] The criticized statements were, as the record shows, statements of facts intended to be proved by witnesses and later actually so proved.[14]

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[11] The opinion (R. 713) here again uses asterisks. The record reads: "*The proof will show* that he was one of the most promising and finest young men in the City of Brunswick" (R. 143). (Italic material omitted in the Court of Appeals opinion.)

Further use of asterisks in the same quotation conceals the fact that counsel's statement that he had been counsel for the Southern Railroad was invited by comment of defense counsel (R. 143, cf. also R. 141) see note 6, *supra*.

[12] The absence of any proof that deceased had been drinking and the overwhelming evidence of his sober habits was apparently overlooked by the Court of Appeals, for its opinion quotes out of context counsel's statement that the deceased was "absolutely sober on this occasion" in such a fashion as to convey the impression that the deceased was not a young man of sober habits. (For the full statement of counsel, see R. 146).

[13] The Court of Appeals apparently overlooked the portion of the record containing this proof, as is evidenced not only by its allegation that the opening statement was improper in this respect, but also by the statement in its opinion that the accident occurred "on a clear night with the moon, almost ready to set, shining through the large oak trees." (R. 711)

[14] The Court of Appeals objected to the length of the complaint read to the jury. It apparently agreed that it was proper to read

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Thus the major part of the court's findings of prejudice to the jury was based either upon matter that was not before the jury at all, or on matters not objected to by defense counsel and in all events proper subject for an opening statement under the court's own standard.

III.

As we have seen, defense counsel did object to or request a mistrial because of some comments in the opening and closing statements and because the opening statement generally was "argumentative."

Counsel's argument was of course vigorous. But it was not at all as strong as the statements held out to have affected the verdict rendered in other cases. See, e.g., the *Socony-Vacuum Oil Co.*, *Diggs* and *Twachtman* cases, *supra.*

Further, this record reveals negligence that might easily call for stronger language than that employed by counsel in his opening and closing statements. Parking an unlighted train after midnight across a dark, inadequately marked grade crossing in a city is an act of wanton indifference to the safety of persons travelling the streets in automobiles.

There is no basis for a holding that prejudice resulted from the few comments which the court instructed the jury to disregard. On the few occasions when counsel mentioned matters outside the evidence, prompt correction was made by the court. Objections by defense counsel were ruled on immediately, at the time of the objection, with a clear instruction to the jury, of the extent to which the statements objected to were proper or should be disregarded. As this Court once observed:

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the complaint to the jury in an opening statement but felt that the complaint was too lengthy. It did not advert to the fact that the original complaint was only two pages (R. 56-58) but that the defendant by motion insisted that the complaint be amended so as specifically to set forth all acts of negligence complained of. (R. 62)

> "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since, in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." *Dunlop* v. *United States,* 165 U.S. 486, 498.

Nor, we have seen, was the case a shaky one, likely to go either way on a turn of phrase. Counsel did not exaggerate in making the accident appear to be a tragic one. Read as a whole, the opening and closing speeches are not out of line, as the excerpts quoted by the Court of Appeals would suggest. As Judge Goodrich observed in *Smith* v. *Philadelphia Transp. Co.,* 173 F.2d 721, 726 (C.A. 3, 1949): "Juries are not so likely to get excited or inflamed by lawyers' talk as lawyers think they are." The plain facts of this case were far more likely to outrage the jury than any talk.

In refusing to let the verdict in the first trial stand, the Court of Appeals based its reversal on an error of law by the trial judge. The second trial was free from such error. The Court of Appeals' second reversal is not based on errors of law but on the presumption that the jury did not determine the facts fairly. The record in this case makes the conclusion insupportable.

IV.

This case has already been tried twice. A third trial has now been ordered. Yet liability is clear, and there is little reason to expect a different outcome in the trial court.

The principal result of the decision below is added hardship which is unnecessary under the well-established rule of this Court requiring that the trial judge be upheld in his use of judgment in guiding the trial, and that the jury's twice-made verdict on the facts be accepted. To safeguard the constitutional right to a jury trial, petitioner asks this Court to set down a standard that will instruct the Court

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of Appeals that it exceeded the proper boundaries of its functions.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted, the judgment of the Court of Appeals reversed and the verdict of the jury reinstated.

Respectfully submitted,

THURMAN ARNOLD
1229 19th Street, N.W.
Washington 6, D.C.

E. WAY HIGHSMITH,
Brunswick, Georgia

Attorneys for Petitioner.

ARNOLD, FORTAS & PORTER,
1229 19th Street, N.W.,
Washington 6, D. C.

HIGHSMITH & HIGHSMITH,
Brunswick, Georgia.

Of Counsel.

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